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**Federal Communications Commission**

WASHINGTON, D. C. 20554

Federal Communication Commission  
Bureau / Office

**ORIGINAL**

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations  
(Arlington, The Dalles, Moro, Fossil, Astoria,  
Gladstone, Tillamook, Springfield-Eugene,  
Coos Bay, Manzanita and Hermiston, Oregon  
and Covington, Trout Lake, Shoreline, Bellingham,  
Forks, Hoquiam, Aberdeen, Walla Walla, Kent,  
College Place, Long Beach and Ilwaco, Washington)

MB Docket No. 02-136

To: Chief, Allocations Branch

**MOTION TO DISMISS**

Triple Bogey, LLC; MCC Radio, LLC and KDUX Acquisition, LLC (collectively "Triple Bogey") herein move to dismiss from this proceeding the previously abandoned allotment proposal of Mid-Columbia Broadcasting, Inc. and First Broadcasting, L.P. (collectively "First Broadcasting") to relocate Station KMCQ, Channel 283C, The Dalles, Oregon, to Covington, Washington. In support of this motion the following is stated:

First Broadcasting's moving target tactics cannot be countenanced. The cynical manipulation of the allotment process cannot be tolerated. First Broadcasting's actions are nothing short of outrageous.

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## I. Background

The First Broadcasting parties originally proposed in their Petition for Rulemaking, filed October 29, 2001, to delete Channel 283C from The Dalles, Oregon, and add Channel 283C3 at Covington, Washington, and modify the license of Station KMCQ accordingly. Because that relocation would create unserved and underserved areas, First Broadcasting proposed back-fill vacant allotments – Channel 283C1 at Moro, Oregon; Channel 261C2 at Arlington, Oregon, and Channel 226A at Trout Lake, Washington. On June 7, 2002, the Commission issued a *Notice of Proposed Rule Making* (“NPRM”) regarding First Broadcasting’s proposal (DA 02-1339).

On the date set for comments and counterproposals, July 29, 2002, the First Broadcasting parties, joined by Saga Broadcasting Corp. (“Saga”), licensee of Station KAFE(FM), Bellingham, Washington, filed their “Comments and Amended Proposal,” in which they proposed deleting Channel 283C from The Dalles, Oregon, and allotting Channel 283C2 to Kent, Washington, for use by Station KMCQ. The relocation of KMCQ to Kent involved changing the frequency of KAFE from Channel 282C to Channel 281C and, if necessary, use of a directional antenna by KAFE. Pursuant to an agreement with First Broadcasting, Saga agreed to the necessary modifications of the KAFE facilities.

The Kent counterproposal obviously was mutually exclusive with the Covington proposal.

On July 29, 2002, Triple Bogey filed its counterproposal that entailed deleting Channel 284C2 at Aberdeen, Washington, allotting Channel 283C2 at Shoreline, Washington, and modifying the license of KDUX-FM to specify operation on the Shoreline allotment. To accommodate that change, Triple Bogey sought, *inter alia*, the same changes in the facilities of KAFE as did First Broadcasting in its Kent counterproposal.

On March 12, 2004, the Commission issued an *Order to Show Cause* (DA 04-607) directing Saga to disclose the consideration that it was to receive under its agreement with the First Broadcasting parties for the modification of KAFE's facilities. The *Order to Show Cause* further stated that the Triple Bogey parties were to state whether they would pay Saga the same consideration to permit the Shoreline allotment.

In a pleading filed April 26, 2004, Triple Bogey, noting that the consideration that Saga was to receive had not yet been disclosed, stated that if the consideration specified was commercially reasonable under the circumstances and if the Commission required Triple Bogey to match such consideration as a precondition to adoption of the Shoreline allotment proposal, Triple Bogey would pay such consideration.

For their part, Saga and the First Broadcasting parties, instead of complying with the *Order to Show Cause*, sought to avoid the Commission's directive by withdrawing the proposal to move KMCQ to Kent. While Saga filed a copy of the agreements regarding modification of KAFE's facilities, it requested confidential treatment of those documents and did not provide those documents to the other parties in the proceeding. (On May 11, 2004, Triple Bogey filed an opposition to the request for confidential treatment of those documents. To date, the Commission has not acted upon that opposition.)

The First Broadcasting parties asserted that with the withdrawal of the Kent proposal, their proposal to move KMCQ to Covington, Washington, was to be revived.

## II.

### **First Broadcasting's Abandoned Covington Proposal Cannot be Revived**

There can be no doubt that First Broadcasting abandoned its proposal to move KMCQ to Covington, Washington, by filing its mutually exclusive proposal to move the station to Kent instead. To permit First Broadcasting, in the face of stringent opposition, to revive a proposal discarded nearly two years ago is unacceptable. Other parties to the proceeding clearly are prejudiced by such flip-flop tactics.

The Commission has made clear that it no longer entertains alternative proposals advanced by the same party. *E.g., Quannah, Texas* 18 FCC Rcd 9495, 9497 (Chief, Audio Div., 2003); *Winslow, Arizona*, 16 FCC Rcd 9551 (Mass Media Bur., 2001). Thus, it is clear that First Broadcasting could not simultaneously prosecute alternative proposals for relocation of KMCQ – one for Covington and one for Kent. By filing the Kent counterproposal, it turned its back once and for all on the Covington proposal.

While the First Broadcasting parties stated in their “Comments and Amended Proposal” that they would apply for the channel at Kent and construct the facility as authorized, no such pledge was made with respect to construction of the station if the channel were allotted to Covington.

As Mercer Island School District (“Mercer Island”) pointed out in its “Statement Regarding Withdrawal of Counterproposal,” filed May 24, 2002,<sup>1</sup> the *NPRM* required the First Broadcasting parties not only to comment on the merits of their Covington proposal, but to restate their present intention to apply for Channel 283C3 at Covington if allotted, and if authorized, to promptly

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<sup>1</sup> The *Report and Order* released May 28, 2004, makes no reference to, *inter alia*, Mercer Island’s May 24 statement or the arguments presented therein.

construct the station. First Broadcasting did not do so. Their failure to file a timely expression of interest regarding the Covington proposal is fatal. *E.g., Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336, ¶ 10 (1988), *recon. denied*, 4 FCC Rcd 3412 (1989), *aff'd. sub nom. Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990); *Butler, Georgia*, 17 FCC Rcd 1653 (Chief, Allocations Branch, 2002); *Cross City, Florida*, 14 FCC Rcd 7772 (Chief, Allocations Branch, 1999).

In support of their request to reinstate the Covington proposal, the First Broadcasting parties cited *Wickenburg, Arizona*, 17 FCC Rcd 7222 (Assistant Chief, Audio Division, 2002) and *Springfield, Tennessee*, 18 FCC Rcd 25628 (Assistant Chief, Audio Division, 2003). But in each of those cases the counterproposal in question was withdrawn only a short time after being filed and no party opposed the reinstatement of the original proposal.<sup>2</sup> Here, First Broadcasting, for tactical purposes, seeks to revive its original proposal nearly two years after it was abandoned and over the objection of both Triple Bogey and Mercer Island.

Allowing a party, to the prejudice of other parties, to prosecute an allotment proposal for which it failed to file a timely expression of interest undermines the integrity of the Commission's processes. *Amor Family Broadcasting, supra*, 918 F.2d at 963. Furthermore, in light of the fact that First Broadcasting abandoned the Covington proposal as of the comment deadline, the parties' reply

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<sup>2</sup> In *Wickenburg*, the counterproposal had not even been placed on public notice by the time it was withdrawn. 17 FCC Rcd at 7222 n. 4. In *Springfield, Tennessee*, both the filing and the withdrawal of the counterproposal were the product of unforeseen circumstances over which the petitioner had no control (*i.e.*, the Commission's adoption of multiple ownership rules that would have precluded the modification requested and the issuance of a stay of those rules by the United States Court of Appeals for the Third Circuit). 18 FCC Rcd at 25628 n.3. Here, First Broadcasting has not pointed to any unforeseen circumstances to justify its actions.

comments regarding First Broadcasting's proposal focused on the plan to move KMCQ to Kent, not the discarded plan to move it to Covington.<sup>3</sup>

Fundamental fairness and the efficient conduct of agency business dictates that a petitioner may not jump from one proposal to another and then back to the original as its litigation tactics and business considerations change. Stated simply, having abandoned its Covington proposal on July 29, 2002, with the filing of its Kent counterproposal and then having abandoned the Kent counterproposal on April 26, 2004, First Broadcasting no longer has any valid proposal before the Commission. First Broadcasting's efforts to resurrect the Covington proposal should be rejected. The Commission should take the formal action of dismissing both the withdrawn Kent counterproposal and the long-abandoned Covington proposal.

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<sup>3</sup> Indeed, in its Reply Comments, Triple Bogey only passingly addressed the merits of the Covington proposal, pointing out that adoption of either the Kent proposal or the Covington proposal would result in the creation of significant "white" and "grey" areas that would receive replacement service only at some unknown point in the future from First Broadcasting's proposed back-fill allotments. Triple Bogey Reply Comments, filed March 25, 2003 at p. 13 n. 18. *See, e.g., Avoca, Pennsylvania*, 18 FCC Rcd 19199, 19200 (Assistant Chief, Audio Division, 2003) (the public's legitimate expectation that existing service will continue is a factor to be weighed independently against the service benefits that may result from reallocating the channel); *Savannah, Georgia*, 18 FCC Rcd, 17632, 17633 (Assistant Chief, Audio Division, 2003) (same).

WHEREFORE, in light of all circumstances present, this Motion to Dismiss should be GRANTED.

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MCC RADIO, LLC and  
KDUX ACQUISITION, LLC

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June 10, 2004

**CERTIFICATE OF SERVICE**

I, Janice M. Rosnick, do hereby certify that I have on this 10<sup>th</sup> day of June, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing MOTION TO DISMISS to the following:

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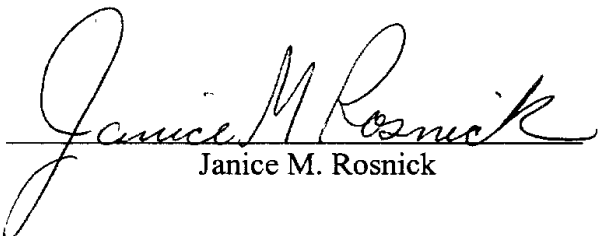
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